

February 4, 2004

D.T.E. 03-04-31

Complaint filed by Commonwealth Learning Center, pursuant to G.L. c. 93, §§ 108 et seq., with the Department of Telecommunications and Energy claiming that its long-distance and local exchange services were switched to Broadview Networks, Inc. without authorization.

APPEARANCES: Commonwealth Learning Center
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Danvers, MA 01923
PRO SE
Complainant

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For: BROADVIEW NETWORKS, INC.
Respondent

I. INTRODUCTION

On October 30, 2003, the Stratford Foundation d/b/a Commonwealth Learning Center (“Complainant”)¹ contacted the Department of Telecommunications and Energy (“Department”) to request an investigation of the switch in the Complainant’s local exchange service and long-distance telephone service from Verizon Massachusetts (“Verizon”) to Broadview Networks, Inc. (“Broadview”).² On December 11, 2003, the Complainant sent to the Department a letter challenging the validity of Broadview’s third party verification (“TPV”) recording.³ As a result, the Department initiated a formal proceeding pursuant to G.L. c. 93, § 110(i). On January 14, 2004, the Department conducted an evidentiary hearing.⁴ George Malloy, President of the Stratford Foundation d/b/a Commonwealth Learning Center, appeared for the Complainant. Broadview offered the testimony of Diane Bryett, a billing analyst for Broadview. In addition to the transcript of testimony, the evidentiary record consists of two exhibits from Broadview and nine from the Department.

¹ The Commonwealth Learning Center is a non-profit organization with facilities in Danvers and Sudbury, Massachusetts (Tr. at 16, 18).

² Pursuant to 220 C.M.R. § 13.02, any unauthorized change to a customer’s primary interexchange carrier (“IXC”) or local exchange carrier (“LEC”) is known as “slamming.”

³ A TPV recording is an audio recording of a customer’s oral authorization to change an IXC or LEC. See G.L. c. 93, § 109(c).

⁴ The Department first scheduled the evidentiary hearing for January 12, 2004. Emergency circumstances prevented Broadview’s appearance on that day, and the Hearing Officer continued the hearing for 48 hours to allow Broadview’s attorney to appear (Tr. at 6).

The Department also received in evidence responses to record requests issued by the Department to both the Complainant and Broadview.

II. POSITIONS OF THE PARTIES

A. Complainant

The Complainant states that it had Verizon as its long-distance and local service provider prior to the alleged slam (Tr. at 19). The Complainant states that in September 2003, Broadview called the Complainant regarding the Complainant's telephone service. The Complainant argues that the Broadview representative on the call misled the Complainant's employee⁵ into believing that the Complainant had no choice but to accept a change in telephone service providers from Verizon to Broadview, and that the phone call was merely a courtesy or formality confirming the change (*id.* at 11-12). The Complainant also argues that Broadview's representative deceived the Complainant's employee by misconstruing the relationship between Broadview and Verizon (*id.* at 12).

Regarding the TPV recording provided by Broadview, the Complainant asserts that Broadview obtained the Complainant's employee's recorded agreement to change carriers through deception and false pretenses (*id.*). At the hearing, the Complainant read into the record a letter from the employee, asserting that she was deceived by Broadview (Exh. DTE-3; Tr. at 12-13). The letter states that the employee agreed to the change in service providers because of the manner in which the sales representative for Broadview "intentionally

⁵ The Complainant states that Broadview spoke with Ms. Shadi Tayarani (Tr. at 12). According to the Complainant, Ms. Tayarani is the director of the Danvers facility of the Commonwealth Learning Center (*id.* at 20).

misled” her to believe that the representative was speaking for Verizon, and not for Broadview (Tr. at 13). According to the Complainant, the Broadview representative transferred the call over to a TPV agent to record the employee’s authorization to change carriers (id.).

In addition, the Complainant argues that its employee, who had been with the Complainant for only “a couple of weeks,” did not have the authority to switch the Complainant’s telephone service provider (id. at 14, 20-21). The Complainant argues that the employee did not have authority because the Complainant has an internal policy that only the President of Commonwealth Learning Center has the authority to switch telephone services (id. at 14, 20-21). The Complainant states that it established this internal policy after a prior slam of the Complainant’s telephone service by an unrelated carrier (id. at 20-21; see RR-DTE-1).

B. Broadview

Broadview argues that the switch in service was a result of an authorized transfer that occurred on September 12, 2003 (Exh. DTE-4). As evidence of an authorized switch, Broadview provided the Department with a copy of a TPV recording, in which the Complainant’s employee spoke with a TPV agent about switching the Complainant’s telephone services (Exh. Broadview-1). Broadview states that it used a Department-registered company to provide TPV services in Massachusetts (Tr. at 24). In response to the Department’s request, Broadview provided the solicitation script used by its telemarketers (RR-DTE-2).⁶

⁶ Broadview originally requested confidential treatment for this record request response but subsequently withdrew its request prior to a ruling by the Hearing Officer.

III. STANDARD OF REVIEW

Pursuant to G.L. c. 93, § 109(a), a change in a customer's primary IXC or LEC shall be considered to be authorized only if the IXC or LEC that initiated the change provides confirmation that the customer authorized the change either through a signed Letter of Agency ("LOA") or oral confirmation of authorization through a TPV obtained by a company registered with the Department to provide TPV services in the Commonwealth. Pursuant to G.L. c. 93, § 110(i), and upon receipt of a slamming complaint, the Department shall hold a hearing to determine, based on our review of the LOA or TPV and any other information relevant to the change in telephone service, whether the customer did or did not authorize the carrier change.

In addition to the Massachusetts slamming laws set forth above, the Federal Communications Commission implemented slamming liability rules in May 2000. See In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, CC Docket No. 94-129, First Order on Reconsideration, FCC 00-135 (rel. May 3, 2000) ("First Order on Reconsideration"). In accordance with those rules, consumers do not have to pay for service for up to 30 days after being slammed; any charges beyond 30 days must be paid but at the rates charged by the company the consumer requested. First Order on Reconsideration at ¶¶ 7-14, 39; 47 C.F.R. § 64.1160(b), (e). If a slam is found to have occurred and the consumer has paid the bill, the slamming company must pay the authorized company 150 percent of the charges it received from the consumer,

and the authorized company will reimburse the consumer 50 percent of the charges the consumer paid to the slamming company. First Order on Reconsideration at ¶¶ 15-21, 42; 47 C.F.R. § 64.1170(b), (c).

IV. ANALYSIS AND FINDINGS

In accordance with G.L. c. 93, § 110(i), the Department conducted an evidentiary hearing to determine whether the change in the Complainant's local and long-distance services was authorized. Broadview stated that it switched the Complainant's services at the request of the Complainant's employee and presented a TPV recording as proof that the Complainant authorized the switch. Pursuant to G.L. c. 93, § 109(c)(1), (2), a valid TPV shall be accomplished by having an unaffiliated TPV agent talk directly with the customer to obtain authorization for the change in telephone service providers, by confirming the following:

- (i) the identity of the person spoken to as well as appropriate verification data;
- (ii) that the person spoken to has the authority to authorize a change in the primary IXC or LEC for a particular line identified;
- (iii) that the authorization has been given to change the primary IXC or LEC for a particular telephone line identified; and
- (iv) the identity of the IXC or LEC which the customer has authorized to be the new primary IXC or LEC.

When the TPV recording was played at the evidentiary hearing, the Complainant identified the voice on the recording as that of its employee, Shadi Tayarani (Tr. at 15). The Complainant does not dispute that its employee responded affirmatively to inquiries from the TPV agent whether she agreed to switch the Complainant's service from Verizon to Broadview and whether she had authority to do so. Rather, the Complainant presents two arguments in

support of its position that the switch was indeed a slam. First, the Complainant argues that Broadview deceived the Complainant's employee into making the responses she did by confusing her as to the relationship between Verizon and Broadview (id. at 11-13). Second, the Complainant argues that its employee, who had only been on the job for a short time, did not have the authority to authorize the change in service providers on behalf of the Complainant (id. at 14). We address these arguments below.

Following review of the TPV tape, and the exhibits and testimony presented by the parties at the hearing, we do not conclude that Broadview deceived the Complainant's employee into authorizing the change in service. In addition to reviewing the TPV recording, the Department reviewed the telemarketing script that Broadview uses when soliciting customers to change service providers (RR-DTE-2). The script makes clear that Verizon and Broadview are competitors, and are not affiliated in any manner (id.).⁷ The TPV recording is also clear that the TPV agent distinguished Broadview from Verizon, and that the Complainant's employee stated that she understood that distinction (Exh. Broadview-1).⁸ Therefore, because both the script and the TPV recording support Broadview's position that the Complainant's employee was informed of and understood the difference between Verizon

⁷ The first line of the script is as follows: "Hi _____ (*customer name*), this is _____, an account representative for Broadview Networks, Verizon's number one competitor . . ." (RR-DTE-2).

⁸ On the TPV recording, the TPV agent stated, "I need to confirm that you also realize that Broadview is not affiliated or a part of Verizon and that Broadview is a competitor of Verizon. Is that correct?" The Complainant's employee answered, "Yes" (Exh. Broadview-1).

and Broadview, we conclude that the Complainant's employee did not make the change in carriers as a result of deception on the part of Broadview.

In addition, although the Complainant asserts that its employee was not authorized to change the Complainant's telephone service provider because only the President of Commonwealth Learning Center is authorized to make such changes, our regulations regarding TPVs are not limited by a business customer's internal personnel policies. 220 C.M.R. § 13.03(2) states:

For a business, the person designated as the contact for [the] local or long distance telecommunications company, or an officer or the owner of the business is presumed to have [the] authority [to authorize a change in carrier]. The TPV agent must ask whether the person spoken to is the customer of record. If the person responds in the negative, the TPV agent must then ask whether the person is authorized to change a primary IXC or LEC. If the person responds in the affirmative, the verification may continue.

Therefore, when the Complainant's employee asserted to the TPV agent that she was authorized to change carriers on the Complainant's behalf,⁹ Broadview was justified in relying on that assertion.

In sum, we conclude that Broadview's action in initiating a carrier change from Verizon to Broadview was not a slam of the Complainant's service. The Complainant has since had its service switched back to Verizon, and Broadview has reimbursed the Complainant for the switch-back charge. Broadview has also voluntarily given the

⁹ On the TPV recording, the TPV agent stated, "I need to confirm that you are the person responsible for choosing a local and long distance carrier at this number. Is this correct?" The Complainant's employee answered, "Yes" (Exh. Broadview-1).

Complainant a full credit for all bills that were issued to the Complainant (Tr. at 15), although we point out that, as a result of our determination in this Order, we would not have ordered Broadview to do so.

As a final issue, we note that the Complainant, a business customer, appeared without an attorney at the evidentiary hearing held at the Department offices on January 14, 2004. Neither Broadview nor the Hearing Officer raised the issue of non-lawyer representation at the hearing. However, because we anticipate that this issue will arise in the future, we offer the following guidance to other business customers who may be inclined to follow the Complainant's lead and seek to appear without counsel in the Department's slamming proceedings.

In WMECo, D.T.E. 01-36/02-20 (2003), the Department discussed at length the issue of non-lawyer representation in Department proceedings. In that case, the Department recognized that while Massachusetts courts allow an interested party to intervene and represent himself pro se, such an intervention is improper where non-lawyers attempt to represent the interests of others. D.T.E. 01-36/02-20, at 7, citing Boston Edison Co. v. Department of Pub. Utils., 375 Mass. 1, 45 (1978).¹⁰ In WMECo, the Department concluded that if we were to allow a party in a Department proceeding to be represented by some one other than an

¹⁰ A natural person appearing pro se represents himself and not another. Varney Enterprises, Inc. v. WMF, Inc., 402 Mass. 79, 82 (1988). Ordinarily, when a natural person seeks to enter an appearance in a legal proceeding to represent another, the person (whether that other person be another natural person, a corporation, trust, partnership, association, or other legal entity, see G.L. c. 93A, § 1), who seeks to represent another must be admitted to the practice of law to act as attorney.

attorney, any communication made by the party or the party's agents to that non-lawyer representative would not enjoy the protection of the attorney-client privilege. Id. at 9.

Because M.G.L. c. 30A, § 11(2), expressly requires that the rules of privilege are binding on administrative agencies (such as the Department), we therefore concluded that it would be prudent not to blur the lines of legal representation and, perhaps unwittingly, encourage parties to jeopardize their own positions. Id.

Since the issuance of the Department's WMECo decision, the Department has required that businesses appearing as parties in Department proceedings be represented by counsel. However, for the reasons discussed below, we determine that slamming proceedings present unique circumstances not present in other Department proceedings, such that a slight deviation from our standard practice may be justified. We note that our slamming regulations specifically define "customer" as "a person or business who resides in Massachusetts and subscribes to local or long distance telephone service." 220 C.M.R. § 13.02 (emphasis added). Therefore, the anti-slamming protections and remedies anticipated by the applicable statutes and regulations are specifically extended to businesses affected by slamming. In addition, we note that the monetary amount likely to be recovered by a business complainant successful in a slamming proceeding would not include the cost to retain counsel to attend the hearing and prosecute the claim on behalf of the business complainant.¹¹ Requiring businesses

¹¹ The Department does not have jurisdiction under G.L. c. 93, §§ 108-110 and 220 C.M.R. §§ 13.00 et seq., to award attorneys fees to prevailing complainants. The slamming statute thus differs from the Consumer Protection Act's potential for discretionary awards of treble damages and attorney fees. G.L. c. 93A, § 7.

to incur potentially large sums to obtain counsel in order to participate in slamming proceedings, where success merely makes a complainant whole for his basic damages, may dissuade, if not foreclose, the participation by business complainants in our slamming proceedings. Such an outcome would not be consistent with the statute's purpose or with our regulations. See Varney, 402 Mass. at 81 (holding that the legislative objective of having a simple, informal, and inexpensive procedure for small claims is best served by allowing corporations to appear in small claims proceedings through non-lawyer principals or employees). In short, because the financial stakes in a slamming case are so modest, requiring a business complainant to pay for cost of legal representation may make the cost of pursuing justice greater than the stakes involved.

Therefore, in future slamming proceedings in which a business complainant seeks to appear without counsel, the Department will entertain a petition by the business complainant to do so prior to the scheduled hearing. However, the petition of a business complainant to appear without counsel must include an acknowledgment that the business complainant understands that in appearing without counsel entails procedural risk, not the least of which is that any communications made by the business complainant to its non-lawyer representative would not enjoy the protection of the attorney-client privilege. Moreover, the Department does not and cannot undertake to remedy or compensate for other deficiencies in representation that may arise from a business waiver of the right to employ legal counsel in slamming proceedings.

V. ORDER

Accordingly, after due notice, hearing, and consideration, the Department finds that Broadview Networks, Inc., did not violate the provisions of G.L. c. 93, § 109(a), by providing long-distance and local telephone services to Commonwealth Learning Center.

By Order of the Department,

_____/s/_____
Paul G. Afonso, Chairman

_____/s/_____
James Connelly, Commissioner

_____/s/_____
W. Robert Keating, Commissioner

_____/s/_____
Eugene J. Sullivan, Jr., Commissioner

_____/s/_____
Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).